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No. 79-1635

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF SOUTH DAKOTA, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

DIRK D. SNEL
LARRY A. BOGGS
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-18) is reported at 614 F. 2d 1190. The opinion of the district court (Pet. App. 19-30) is reported at 462 F. Supp. 905. The opinion of the Interior Board of Land Appeals (Pet. App. 31-57) is reported at 30 I.B.L.A. 388.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1980. The petition for a writ of certiorari was filed on April 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the issuance of mineral patents under 30 U.S.C. 29 by the Department of the Interior constitutes a major federal action significantly affecting the quality of the human environment, and must, therefore, be preceded by the preparation of an environmental impact statement pursuant to the National Environmental Policy Act of 1969.

STATEMENT

The Pittsburgh Pacific Company applied to the Bureau of Land Management for patents embracing twelve contiguous mining claims located within the Black Hills National Forest in Lawrence County, South Dakota. The application was based on an alleged discovery, pursuant to the mining law of 1872 (Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*), of 160 million tons of relatively low grade iron ore. Pittsburgh tentatively proposes to mine 96 million tons of this ore at an annual rate of 7.2 million long tons for shipment by rail to ultimate purchasers. The Forest Service, Department of Agriculture, challenged the validity of these claims, alleging that Pittsburgh had not made a discovery within the meaning of the mining law of 1872 (Pet. App. 10). See, generally, *United States* v. *Coleman*, 390 U.S. 599 (1968).

An Interior Department administrative law judge dismissed the contest, brought on behalf of the Forest Service, and affirmed the validity of the claims. The Forest Service appealed to the Interior Board of Land Appeals (IBLA). During the proceedings before the IBLA, the State of South Dakota petitioned to intervene and was granted permission to file a brief amicus curiae. South Dakota argued before the IBLA that the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, required the Bureau to prepare an

environmental impact statement (EIS) before issuing a mineral patent to Pittsburgh (Pet. App. 10-11). By opinion of June 15, 1977 (Pet. App. 31-57), the IBLA set aside the decision of the administrative law judge and remanded the case. The IBLA directed the administrative law judge, on remand, to consider the issue of discovery in light of the availability and cost of water and additional land necessary for the profitable development of Pittsburgh's claims (Pet. App. 35-45). In addition, the IBLA directed that analysis of the cost of complying with applicable environmental quality statutes and regulations be considered in determining whether Pittsburgh had made a discovery of a valuable mineral as required by the mining law of 1872.[1] South Dakota was admitted as a party to the contest to present evidence on this question (Pet. App. 45-47). However, the IBLA held that the Bureau was not required to prepare an EIS prior to issuance of a mineral patent, should it later be determined that Pittsburgh had made a discovery of a valuable mineral (Pet. App. 47-56).

South Dakota then initiated this action for declaratory and injunctive relief, seeking a determination that the Secretary of the Interior must prepare an EIS before Pittsburgh can be granted mineral patents to its twelve claims. On December 26, 1978 (Pet. App. 19-30), the district court dismissed the action. The court held that an EIS was not required on two alternative grounds. First, the court held that upon the showing by a claimant of a discovery of a valuable mineral the issuance of a mineral patent was a ministerial act, and that, accordingly, "the

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[1]This portion of the IBLA's order of remand, setting forth environmental compliance costs as one test of discovery, is being contested by Pittsburgh in a separate case, now pending in the district court. *Pittsburgh Pacific Co.* v. *United States Department of the Interior*, No. CIV 77-5055 (D. S.D.).

Secretary's nondiscretionary actions in processing a mineral patent application are not compatible with requiring the preparation of an EIS before a mineral patent can issue" (Pet. App. 27). The court reasoned that the issuance of a mineral patent could not be aided by the preparation of an EIS, the purpose of which is to gather information to aid in agency decision-making (Pet. App. 25-27). Second, because Pittsburgh had a legal right to extract minerals without a patent, the court concluded that the issuance of a mineral patent was not a major federal action significantly affecting the quality of the human environment (Pet. App. 30).

South Dakota then appealed. By opinion of February 12, 1980 (Pet. App. 9-18), the court of appeals affirmed the district court's judgment. It held that the issuance of a mineral patent did not require an EIS, because it was not a major federal action significantly affecting the quality of the human environment as described in Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). Relying on *Union Oil Co.* v. *Smith*, 249 U.S. 337 (1919), the court stated that, since "a mineral patent in actuality is not a federal determination which enables the party to mine, we conclude in present context that the granting of such a patent is not a 'major' federal action within the meaning of §102(2)(C)" (Pet. App. 17; footnote omitted). The court noted, as had the IBLA (Pet. App. 49), that after the issuance of a patent, an EIS would almost certainly be required because of necessary future federal actions before Pittsburgh could undertake actual mining operations (Pet. App. 17-18). See, *e.g.*, 36 C.F.R. Part 252 (requiring approval of mining plans where claims are within national forests). The court expressly declined to reach the abstract question whether a ministerial act in some case might require preparation of an EIS (Pet. App. 15).

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court.

1. Since 1866, the federal mining laws have permitted citizens to seek, discover, and extract valuable minerals on the public domain and to secure fee title to lands containing such discoveries. Act of July 26, 1866, ch. 252, 14 Stat. 251; see *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). Under the Act of May 10, 1872, ch. 152, 17 Stat. 91, as amended, 30 U.S.C. 22 *et seq.*, which remains the basic law governing mineral claims, a person must establish that he has discovered a *valuable* mineral deposit within the limits of each of his claims. *Cole* v. *Ralph*, 252 U.S. 286, 295 (1920). The test for value is the prudent person test, *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905), as refined by the marketability test, *United States* v. *Coleman*, 390 U.S. 599, 602-603 (1968). The combined standard requires that a person of ordinary prudence would be justified in the further expenditure of time and money with a reasonable expectation that the minerals from the claim can be marketed at a profit. A claimant who meets this test, and who otherwise complies with the provisions of the federal mining laws and with local recordation laws, has an "exclusive right of possession to the extent of his claim as located, with the right to extract the minerals, even to exhaustion, without paying any royalty to the United States as owner, and without ever applying for a patent * * *." *Union Oil Co.* v. *Smith*, 249 U.S. 337, 348-349 (1919). Once perfected, the claimant has a "possessory right, for all practical purposes of ownership, [that] is as good as though secured by patent." *Wilbur* v. *United States ex rel. Krushnic*, 280 U.S. 306, 316-317 (1930).

In these circumstances, the issuance of a mineral patent cannot reasonably be considered a "major Federal action[] significantly affecting the quality of the human environment" within the meaning of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). That the issuance of a patent would be a federal act is not controlling. The federal action must significantly affect the quality of the human environment before the duty to prepare an EIS arises. See, *e.g.*, *Atlanta Coalition on the Transportation Crisis, Inc.* v. *Atlanta Regional Commission*, 599 F. 2d 1333, 1344-1347 (5th Cir. 1979). Because the mining claimant has a right to mine without a patent, the issuance of a patent is a federal action without environmental consequences. Accordingly, as held by the courts below, this event need not be preceded by preparation of an EIS.

2. Further, this Court has recognized that "the moment at which an agency must have a final statement ready 'is the time at which it makes a recommendation or report on a *proposal* for federal action.' " *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976), quoting *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 320 (1975) (emphasis in original). Here, there presently exists no proposal for federal action. There is now only an agency adjudicatory proceeding which may or may not result in a finding of compliance with the mining laws. The IBLA decision remanded the proceedings on the question of discovery for reconsideration in light of, among other factors, the cost of complying with environmental protection laws and regulations (Pet. App. 45-47). Accordingly, even if it would otherwise be required, these proceedings have not reached a stage where an EIS must be prepared. See *Mobil Oil Corp.* v. *FTC*, 562 F. 2d 170 (2d Cir. 1977).

Moreover, if and when Pittsburgh should establish its right to patents, it is likely that future federal actions will occur which require preparation of an EIS independently and apart from the mere issuance of a patent. As Pittsburgh's mining claims are within a national forest, a mining plan would have to be approved by the Forest Service before actual mining operations could begin. 36 C.F.R. Part 252. In view of Pittsburgh's tentative plan, this event would surely require preparation of an EIS under the Forest Service's regulations. 36 C.F.R. 252.4(f). In addition, it appears that a right of way approval for a railroad line and for waterpipeline would also be necessary, and an exchange of land with the Forest Service might be required before mining could begin. Either of these events may require preparation of an EIS. See *National Forest Preservation Group* v. *Butz*, 485 F. 2d 408 (9th Cir. 1973); *Greene County Planning Board* v. *FPC*, 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972).

South Dakota argues (Pet. 8-9), however, that an EIS would be useful in deciding whether a valuable mineral location has been made. And IBLA clearly agrees that environmental costs are an important factor in present day mineral patent applications. Pet. App. 45-47; see also *United States* v. *Kosanke Sand Corp.*, 12 I.B.L.A. 282, 298-299 (1973). But, although environmental costs will be considered, the IBLA correctly reasoned that an EIS encompasses much more than environmentally related costs (Pet. App. 48-49), and, accordingly, declined to cause preparation of an EIS merely to adjudicate a patent application. The fact that an EIS might coincidentally give the Interior Department some of the information it needs (together with much information which it does not need) will not justify judicial complusion of an EIS. For,

as this Court has held, NEPA does not authorize courts to order special agency procedures based upon some judicial view of what is best or most desirable. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 549 (1978).

Finally, the State of South Dakota asserts (Pet. 9-10) that the preparation of an EIS would assist the State in making its environmental decisions with respect to Pittsburgh's proposed mining operations. But there is no precedent to the effect that a federal agency must prepare an EIS to assist state or local agencies in their decisionmaking. To the contrary, the District of Columbia Circuit has expressly said that "the EIS was not intended to be a substitute community planning device," *Concerned About Trident* v. *Rumsfeld*, 555 F. 2d 817, 829 (1976).

In summary, nothing in the present posture of this case constitutes a proposal for major federal action significantly affecting the quality of the human environment, which requires preparation of an EIS.[2]

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[2]The State suggests (Pet. 6-8) that this Court should determine whether an EIS is required for ministerial acts of agencies. The court below expressly declined to decide this issue (Pet. App. 13-15). For this reason, we suggest that the abstract question is not properly before this Court. See *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 735 (1978); *Preiser* v. *Newkirk*, 422 U.S. 395, 401-403 (1975). In any event, the conclusion that an EIS is not required for a nondiscretionary action is well founded. *NRDC* v. *Berklund*, 609 F. 2d 553, 557-559 (D.C. Cir. 1979) (per curiam); cf. *Scenic Rivers Ass'n* v. *Lynn*, 520 F. 2d 240, 245 (10th Cir. 1975), rev'd on other grounds *sub nom. Flint Ridge Dev. Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

DIRK D. SNEL
LARRY A. BOGGS
Attorneys

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